

APPEAL NO. 031907
FILED SEPTEMBER 9, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 9, 2003. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (carrier) waived the right to contest the compensability of the respondent/cross-appellant's (claimant) claimed injury of _____, under Section 409.021, and that, because the carrier waived the right to contest compensability, the claimant sustained a compensable injury on _____, and the carrier is not relieved of liability under Sections 409.002 or 409.004. The carrier appeals the hearing officer's determination that it waived the right to contest compensability under Section 409.021. The claimant appeals the hearing officer's determinations that she was not injured in the course and scope of her employment on _____; that she failed without good cause to timely notify her employer of her injury; and that she failed without good cause to timely file a claim for compensation. The claimant also contends that the carrier received written notice of the claimed injury at an earlier date than was found by the hearing officer. The carrier filed a response to the claimant's appeal. No response to the carrier's appeal was received from the claimant.

DECISION

Affirmed.

With regard to the waiver issue, the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 12, 2002, reflects that the carrier first received written notice of the claimant's claimed injury of _____, on October 30, 2002. In the TWCC-21, the carrier denied that the claimant sustained an injury in the course and scope of employment, gave timely notice of injury to the employer, and timely filed a claim for compensation. The hearing officer found that the carrier's first written notice of injury was on October 30, 2002, when it received the claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), and that the carrier filed a TWCC-21 on November 12, 2002, disputing the claim. The hearing officer further found that the carrier did not pay or dispute the claim within seven days of receiving written notice of the alleged injury, and concluded that the carrier waived the right to contest the compensability of the claimed injury under Section 409.021.

In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the court concluded that under Sections 409.021 and 409.022, a carrier that fails to begin payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. In the instant case, the carrier's TWCC-21 denying compensability was not filed within seven days after it received written notice of the

injury. There is no indication in the record that the carrier filed a TWCC-21 within seven days of its first written notice of injury agreeing to pay benefits as they accrued nor is there any indication that the carrier actually paid benefits. The carrier contends that as of the date it received written notice of the injury, and within the following few weeks, there were no benefits to be paid, and since it disputed compensability within 60 days, there was no waiver.

In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Downs, the Texas Supreme Court stated "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability." In Appeal No. 030380-s, the Appeals Panel stated that it would decline to follow Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003, and held that "to comply with the Supreme Court's holding in Downs, the carrier has the burden to prove that it 'took some action within seven days,' and to present evidence indicating the action taken." The Appeals Panel went on to state in that decision that "Since the carrier in this case presented no evidence that it took any action indicating that it had accepted the claim or intended to pay benefits within seven days of receiving written notice, we conclude that the hearing officer did not err in determining that the carrier waived its right to dispute compensability of the claimed injury." In accordance with our decision in Appeal No. 030380-s, we conclude that the hearing officer did not err in determining that the carrier waived its right to contest compensability of the claimed injury.

The carrier asserts that the decision in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) applies to the facts of the instant case. In Williamson, the court held that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law." The Appeals Panel has held that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury, which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002. In the instant case, the hearing office determined that the claimant does have an injury to her right shoulder as claimed by the claimant, and since the evidence supports that finding, we do not find the Williamson case to be applicable.

With regard to the claimant's appeal, we conclude that the hearing officer's determinations that the claimant was not injured in the course and scope of her employment, that the claimant failed without good cause to timely notify her employer of her claimed injury, and that the claimant failed without good cause to timely file a claim for compensation are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). However, because the carrier waived the right to dispute the compensability of the claimant's claimed injury, the claimant's claimed injury

is compensable as a matter of law. Texas Workers' Compensation Commission Appeal No. 030280, decided March 27, 2003. In addition, since the carrier lost its right to contest compensability by not complying with the requirements of Section 409.021(a), it lost its right to assert a defense under Section 409.002 based upon the claimant's failure to give timely notice of injury to the employer, and lost its right to assert a defense under Section 409.004 based upon the claimant's failure to timely file a claim for compensation. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002; Texas Workers' Compensation Commission Appeal No. 022091-s, decided October 7, 2002. Consequently, the carrier is not relieved of liability under Sections 409.002 or 409.004.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Edward Vilano
Appeals Judge